

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT KNOXVILLE
October 14, 2008 Session

STATE OF TENNESSEE v. NATHAN ROSS McCRACKEN

**Direct Appeal from the Criminal Court for Anderson County
No. A6CR0073 Donald R. Elledge, Judge**

No. E2008-00361-CCA-R3-CD - Filed December 22, 2008

The Defendant, Nathan Ross McCracken, pled guilty to possession of marijuana with intent to sell. Following a sentencing hearing, the trial court denied the Defendant's request for judicial diversion, sentenced him to one year of supervised probation, and imposed a \$2000 fine. The Defendant appeals, contending the trial court erred when it: (1) denied his request for judicial diversion; and (2) ordered him to pay a \$2000 fine. After thoroughly reviewing the record, we conclude the trial court did not err when it denied judicial diversion, but it did err when it imposed the \$2000 fine. Accordingly, we affirm in part the judgment of the trial court and remand for further proceedings as to the imposition of any fine.

**Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Criminal Court Affirmed in Part,
Vacated in part, and Remanded.**

ROBERT W. WEDEMAYER, J., delivered the opinion of the court, in which JERRY L. SMITH and JOHN EVERETT WILLIAMS, JJ., joined.

Nancy C. Meyer, Clinton, Tennessee, for the Appellant, Nathan Ross McCracken.

Robert E. Cooper, Jr., Attorney General and Reporter; Michael E. Moore, Solicitor General; Deshea Dulany, Assistant Attorney General; David S. Clark, District Attorney General; Sandra N.C. Donaghy, Assistant District Attorney General, for the Appellee, State of Tennessee.

OPINION

I. Facts

The presentence report filed in the Defendant's sentencing hearing sets forth the following undisputed version of the traffic stop and subsequent arrest of the Defendant that underlie this appeal:

On or about December 16, 2005, the Defendant was stopped by Tennessee Highway Patrol for a headlight violation. After the citation was issued, the Defendant was asked by police if he had any illegal items in his car. The Defendant stated that he had hyrdo pills in a cigarette pack located in the driver's door. Defendant stated he also had a pound of marijuana in a backpack located in the front passenger seat. Defendant was then placed under arrest.

Subsequent tests revealed that the backpack contained 497.2 grams, slightly more than a pound, of marijuana.

After the Defendant pled guilty to one count of possession of marijuana with intent to sell, the trial court held a sentencing hearing wherein the following evidence was presented: the presentence report indicated that the Defendant, twenty-three years old at the time of the hearing, graduated from high school. After completing high school, the Defendant worked for a series of employers. Shortly after his 2005 arrest, the Defendant began working at Cracker Barrel, and at the 2008 hearing he introduced a recent pay stub, which indicated that he continued to work at Cracker Barrel.

State of Tennessee Probation & Parole employee Karen Orsulack testified that the Defendant provided her with the following information, which she included in his presentence report: when the Defendant was sixteen years old, he was adjudicated as "delinquent" for the crime of aggravated burglary. At seventeen, the Defendant began consuming alcohol and soon developed an addiction to Xanax and hydrocodone, which he obtained illegally. In his late teens the Defendant began using marijuana. The Defendant told Orsulack that he had used marijuana as recently as two to three weeks before their interview. At the time of the hearing, the Defendant had no adult criminal history.

The Defendant testified at his hearing that, although he had "cleaned [his] act up" and no longer abused prescription drugs, he "would not object" to drug treatment. He introduced the results of a negative drug test, to which he submitted himself six months before the sentencing hearing. The Defendant also introduced a copy of his application for judicial diversion in which an employee of the Tennessee Bureau of Investigation certified that the Defendant had no prior disqualifying felony or misdemeanor conviction; had not previously been granted diversion; and had not previously been granted an expungement of a criminal offense.

After hearing the evidence, the trial court denied the Defendant's request for judicial diversion, sentenced him to one year of supervised probation, and imposed a \$2000 fine. It is from this judgment that the Defendant now appeals.

II. Analysis

On appeal, the Defendant contends: (1) the trial court abused its discretion when it denied

his request for judicial diversion; and (2) the trial court erred when it imposed a \$2000 fine upon the Defendant.

A. Judicial Diversion

The Defendant contends that the trial court abused its discretion when it denied him judicial diversion. The State answers that the trial court considered the relevant principles and factors when it denied judicial diversion.

Where a defendant is eligible for judicial diversion, a judge has the discretion to defer proceedings without entering a judgment of guilty. T.C.A. § 40-35-313(a)(1)(A) (2006). Following a grant of judicial diversion, the defendant is on probation but is not considered a convicted felon. T.C.A. § 40-35-313(a)(1)(A). To be eligible for judicial diversion, a defendant must be a “qualified defendant” as defined by the Tennessee Code section governing judicial diversion:

- (B)(i) As used in this subsection (a), “qualified defendant” means a defendant who
 - (a) Is found guilty of or pleads guilty or nolo contendere to the offense for which deferral of further proceedings is sought;
 - (b) Is not seeking deferral of further proceedings for a sexual offense, a violation of § 71-6-117 or § 71-6-119 or a Class A or Class B felony; and
 - (c) Has not previously been convicted of a felony or a Class A misdemeanor.

T.C.A. § 40-35-313(a)(1)(B)(i). The trial court found that the Defendant was eligible for judicial diversion based on these requirements. However, eligibility does not entitle the Defendant to judicial diversion. *State v. Bonestall*, 871 S.W. 163, 168 (Tenn. Crim. App. 1993), *overruled on other grounds by State v. Hooper*, 29 S.W.3d 1, 9 (Tenn. 2000).

Once a defendant is deemed eligible for judicial diversion, the trial court must consider several factors when deciding whether to grant judicial diversion. Due to the similarities in pre-trial diversion, which is administered by the district attorney general, and judicial diversion, courts draw heavily from pre-trial diversion law and examine the same factors:

[A court] should consider the defendant’s criminal record, social history, mental and physical condition, attitude, behavior since arrest, emotional stability, current drug usage, past employment, home environment, marital stability, family responsibility, general reputation and amenability to correction, as well as the circumstances of the offense, the deterrent effect of punishment upon other criminal activity, and the likelihood that [judicial] diversion will serve the ends of justice and best interests of both the public and the defendant.

State v. Cutshaw, 967 S.W.2d 332, 344 (Tenn. Crim. App. 1997). Additionally, “a trial court should

not deny judicial diversion without explaining both the specific reasons supporting the denial and why those factors applicable to the denial of diversion outweigh other factors for consideration.” *Id.* (citing *Bonestal*, 871 S.W.2d at 168).

The Defendant contends that the trial court erred when it did not support its denial of judicial diversion with specific explanations and gave little weight to evidence of the Defendant’s rehabilitative potential. When a Defendant challenges the denial of judicial diversion, we review the trial court’s decision under an abuse of discretion standard. *Cutshaw*, 967 S.W.2d at 344. We must conclude that “no substantial evidence exists to support the ruling of the trial court” if we are to grant the Defendant relief. *Id.*

After the trial court considered the evidence, it first identified the factors that, in its view, were favorable to the Defendant. It noted that the aggravated burglary offense for which the Defendant was adjudicated delinquent did not threaten or cause serious bodily injury and that the Defendant had no other criminal history. Addressing the Defendant’s “behavior since arrest” and his “home environment,” the court noted the Defendant’s cooperation with law enforcement and that, at the time of the hearing, he lived in his parents’ stable and supportive home. The trial court also noted that the Defendant had been continuously employed since his arrest.

The trial court then, as *Cutshaw* requires, identified the factors that, in its view, indicated the Defendant’s lack of amenability to correction. 967 S.W.2d at 344. Addressing the Defendant’s “criminal record,” it first noted that the aggravated burglary adjudication would be a felony conviction if the Defendant had been charged as an adult. The trial court then discussed the Defendant’s “current drug use,” stating that the Defendant had been abusing substances for six years without seeking treatment. The trial court did not accredit the Defendant’s testimony that he had abandoned his drug habit. The Defendant’s admission that he used marijuana within two or three weeks of the presentence report interview was “very disturbing” to the trial court. The trial court noted that it was also troubled by the Defendant’s inability to recall the identity of the person that provided him with the marijuana he pled guilty to possessing. Addressing the “circumstances of the offense” with respect to the “deterrent effect of punishment upon other criminal activity,” the trial court found that the large quantity of marijuana the Defendant possessed indicated that “[t]he deterrent[t] value to the accused, as well as [to] others, obviously . . . [spoke] for itself.” Finally, the trial court found that diversion “would not serve the best interest of the public.”

Substantial evidence supports the findings upon which the trial court based its denial of judicial diversion. In the presentence report, the Defendant candidly described his long history of drug abuse and admitted that he continued using marijuana after his arrest. He also conceded that he was adjudicated delinquent on an aggravated burglary charge. The trial court correctly noted that the Defendant’s aggravated burglary adjudication would be a felony conviction were he charged as an adult. T.C.A. § 39-14-403(b) (2006). Also, neither party disputed that the Defendant possessed more than a pound of marijuana upon arrest. Therefore, substantial evidence supports the trial court’s findings that Defendant committed an offense as a juvenile that would be a felony for an adult; the Defendant continued to abuse drugs after his arrest; strict punishment would deter others;

and diversion would not serve the public's best interest. Accordingly, the trial court did not abuse its discretion when it denied judicial diversion, because it examined all the factors relevant to diversion and explained why the factors indicated diversion was not appropriate for the Defendant. *Cutshaw*, 967 S.W.2d at 334. The Defendant is not entitled to relief on this issue.

B. Imposition of Fine

The Defendant contends that, because he is indigent, the trial court erred when it fined him \$2000. The State responds that, because indigence does not require reduction or waiver of the mandatory minimum fine, the trial court did not abuse its discretion when it fined the Defendant.

This Court's review of the fine imposed by the trial court is *de novo* with a presumption of correctness. T.C.A. § 40-35-401(d) (2006). This presumption is conditioned upon an affirmative showing in the record that the trial court considered the sentencing principles and all relevant facts and circumstances. *State v. Ashby*, 823 S.W.2d 166, 169 (Tenn. 1991). If the trial court fails to comply with the statutory directives, there is no presumption of correctness, and our review is *de novo*. *State v. Poole*, 945 S.W.2d 93, 96 (Tenn. 1997).

The Tennessee Code provides that a person convicted for the first time of a felony drug offense involving a scheduled controlled substance "shall be fined no less than" a "minimum mandatory fine" of \$2000. T.C.A. § 39-17-428(a)-(b)(9) (2006). The same section of the Code also authorizes a court, under certain circumstances including indigence, to reduce or waive the minimum mandatory fine:

Unless the judge . . . determines that a person convicted . . . is indigent, or that payment of the minimum fine would result in a severe economic hardship, or such fine would otherwise not be in the interests of justice, the minimum fines imposed by this section shall be mandatory and shall not be reduced, suspended, waived or otherwise released by the court.

T.C.A. § 39-17-428(d)(1). The Defendant characterizes the Code's language about the conditions under which a court may depart from the mandatory minimum fine as the abolition of a mandatory minimum fine for indigent defendants. However, a finding of indigence does not preclude a trial court from imposing the mandatory minimum fine. Instead, as explained below, the waiver or reduction of a mandatory minimum fine, even upon an indigent defendant, remains an exercise of the trial court's discretion.

We begin by noting how our Supreme Court interpreted a similar statute that deals with a court's imposition of its costs upon a defendant. *State v. Black*, 897 S.W.2d 680, 683-84 (Tenn. 1995) (interpreting T.C.A. § 40-25-129(2) (2006)). It concluded that, although the statute implicitly allows a trial court to waive court costs, the trial court's decision to do so is discretionary. *Id.* Our Supreme Court specifically held that a defendant's indigence is only a factor in and does not entitle him to the waiver or reduction of court costs. *Id.*

In line with our Supreme Court's analysis in *Black*, this Court has interpreted the statute presently at issue to give trial courts the discretionary power to waive or reduce fines. In *State v. Beasley*, the trial court acknowledged the Defendant's indigence but imposed the fine, noting that she might become able to pay after she left prison. No. 01C01-9801-CR-00018, 1998 WL 626989, at *3-4 (Tenn. Crim. App., at Nashville, Sept. 16, 1998), *no Tenn. R. App. P. 11 application filed*. This Court affirmed the fine, explaining that a defendant's indigence is only one of several factors relevant to the determination of an appropriate fine. *Id.*

In *State v. Layne*, however, this Court reversed a fine where the trial court "rotely imposed the fine . . . without independent consideration of an appropriate fine." No. M1998-00746-CCA-R3-CD, 2001 WL 777071, *2 (Tenn. Crim. App., at Nashville, July 11, 2001), *no Tenn. R. App. P. 11 application filed*. This Court explained that a trial court must base its imposition of even the mandatory minimum fine upon the factors and principles of the 1989 Sentencing Act, such as the Defendant's prior history, mitigating and enhancing factors, potential for rehabilitation, and financial means. *Id.* at *3. Therefore, while the indigence of a defendant does not compel a trial court to waive or reduce a mandatory minimum fine, the trial court nonetheless must adequately analyze whether the mandatory minimum fine is appropriate.

In the case under submission, at the close of the sentencing hearing, the trial court initially set the Defendant's fine at \$250. The State objected, stating that "the minimum felony fine is \$2,000." Counsel for the Defendant responded that the minimum mandatory fine does not apply to an indigent defendant. The court then summarily imposed the \$2000 minimum mandatory fine:

THE COURT: Let me look at my chart. Yes. First conviction for all felonies, I should know that. . . . First conviction for all felony drug offenses involv[ing] a schedule controlled substance is \$2,000.00. Sorry. Anything else?

[DEFENSE COUNSEL]: What is the Court's ruling as to the fine?

THE COURT: Specifically as the statute says and it's on all felony convictions, it's a two thousand minimum . . .

Therefore, it is not clear from the record that the trial court realized that it had the authority and discretion to depart from the mandatory minimum fine. It also is not clear from the record that the trial court considered the principles and factors of the 1989 Sentencing Act when it fined the Defendant \$2000. The record does not demonstrate that the trial court independently considered whether the minimum mandatory fine was appropriate for the Defendant. Therefore, we vacate the trial court's imposition of the \$2000 fine and remand this case to the trial court for further proceedings, consistent with this opinion, as to the appropriate fine, if any, to be imposed.

III. Conclusion

After a thorough review of the record and of applicable law, we conclude the trial court properly denied the Defendant judicial diversion but erred when it fined him \$2000. As such, we affirm trial court's denial of judicial diversion, but we vacate the \$2000 and remand this case to the trial court for further proceedings, consistent with this opinion, pertaining to the appropriate fine, if any to be imposed.

ROBERT W. WEDEMEYER